STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM COURT OF APPEALS CASE NO. 243492 AND OAKLAND COUNTY

CIRCUIT COURT CASE NO. 01-032868-CH, HON. WENDY POTTS

BARBARA SUE TRAXLER and NORMA JEAN CASTLE, Successor Co-Trustees of THE NORMAN JOHN SINCLAIR TRUST, DATED MARCH 27, 1996,

Plaintiffs/Counter-Defendants/Appellees,

v.

SHIRE ROTHBART,

Defendant/Counter-Plaintiff/Appellant.

Supreme Court No. 125948

BRIEF ON APPEAL – APPELLEES

ORAL ARGUMENT REQUESTED

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Counter-Defendants/Appellees
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COUNTER-STATEMENT OF BASIS OF JURISDICTION

Plaintiffs-Appellees concur in Defendant Appellant's statement concerning the basis for the Michigan Supreme Court's jurisdiction pursuant to MCR 7.301(A)(2) and 7.302(C)(2)(b).

COUNTER-STATEMENT OF QUESTION(S) INVOLVED

1. Whether the Court of Appeals erred in holding that an agreement for the sale and transfer of real property is null and void because it was not accepted and signed by both of the active co-trustees appointed by the express terms of the trust document and one co-trustee did not have the sole authority to bind the trust to the sale and, accordingly, Defendant/Appellant could not rely upon MCL 700.7404 to enforce the alleged agreement.

Defendant/Appellant answers: Yes

Plaintiffs/Appellees answer: No

The Court of Appeals answered: No

COUNTER-STATEMENT OF FACTS

INTRODUCTION

This is an action for declaratory relief brought by Plaintiffs-Appellees, Barbara Sue Traxler and Norma Jean Castle, successor co-trustees of the Norman John Sinclair Trust, dated March 27, 1996. Plaintiffs-Appellees are successor co-trustees of their deceased father's estate. Upon the death of their father, Defendant-Appellant Shire Rothbart, by a representative, communicated a written offer to purchase real property held by the trust. The purchase offer was never accepted by both co-trustees, only one, Barbara Sue Traxler. Under well-settled law and the unequivocal language of the trust, both co-trustees must join in executing a contract for the sale of real property by the trust to be valid. Never having been accepted by both co-trustees, the purchase offer is not binding. There simply never was a valid agreement for the sale of real property.

Defendant-Appellant filed a Counterclaim for specific performance, alleging that the Plaintiff-Appellees are attempting to renege on an agreement when, in fact, no binding agreement exists. Defendant-Appellant is unquestionably one of the savviest individuals with regard to real estate transactions. In his Statement of Facts, Defendant-Appellant asserts as "undisputed fact" that the trust agreement does not require both successor co-trustees to act jointly in selling the property. (Defendant-Appellant's Brief pg. 1-2) Not only is Defendant-Appellant's *interpretation* of the language of the trust disputed, it is nothing more than Defendant-Appellant's stretched interpretation of the trust agreement, which speaks for itself. The trial court in its Opinion and Order did not agree with the Defendant-Appellant's interpretation of the trust agreement and found that the trust agreement clearly required joint action by the co-trustees. (8a) The Court of Appeals in its Opinion did not agree with the

Defendant-Appellant's interpretation of the agreement and found the trust language "clear and unambiguous" that the grantor intended for his two daughters to serve as co-trustees. (11a) Defendant-Appellant also asserts in his Statement of Facts that it is undisputed that Barbara Traxler was a sole trustee and that Norma Jean Castle never became a co-trustee prior to the "agreement." (Defendant-Appellant's Brief pg. 2) Again, not only is Defendant-Appellant's *position* regarding the status of the Plaintiffs-Appellees disputed, it is nothing more than Defendant-Appellant's argument on an issue which was left to the court to decide. The trial court did not agree with Defendant-Appellant's position, as set forth in its Opinion and Order. (9a) The Court of Appeals in its Opinion found that there was no evidence put forth by the Defendant to contradict Plaintiffs' proofs that Castle was a co-trustee. (11a) Defendant-Appellant's assertion of its position of the status of the co-trustees as "undisputed fact" is a misstatement and contested by Plaintiffs-Appellees.

Circuit Court Opinion and Order

In the Circuit Court, Defendant-Appellant brought a motion for summary disposition on his claim for specific performance. Plaintiffs-Appellees filed a motion for summary disposition on their claim for declaratory relief. By its Opinion and Order dated June 13, 2002, the Circuit Court granted the Plaintiffs-Appellees' motion and denied the Appellant's motion, finding that the language of the trust appointed both sisters co-trustees and found no language allowing only one of the co-trustees to act on behalf of the trust. (8a) The trial court further found that Defendant-Appellee could not rely on MCL 700.7404 since the agreement is for the sale of real property, and without the signature of both co-trustees, marketable title could not be transferred and, therefore, the agreement was "null and void." (9a)

Court of Appeals Opinion

The Court of Appeals, in a unanimous unpublished per curium Opinion, affirmed the Opinion and Order of the trial court. (10a) In giving effect to the intent of the settlor, the Court of Appeals found the trust language clear and unambiguous that the grantor intended for his two daughters to serve as co-trustees. (11a) In interpreting Section 8.3 of the Trust which gives any successor trustee all the rights and powers of the original trustee, the Court of Appeals notes how this section mirrors the statutory provision to the same effect, MCL 700.7405 and does not mean that one of two appointed co-trustee can act without the other, as proposed by Defendant/Appellee. (11a) Furthermore, the Court of Appeals found that Defendant presented no evidence to create a factual dispute regarding whether Traxler was authorized to act as sole trustee or whether Castle had affirmatively relinquished her authority, finding that Traxler could not unilaterally bind the trust to the purchase agreement contract. (12a)

In addition to MCL 700.7406(4) and MCL 555.21, the Court of Appeals found that the validity of the purchase agreement must be construed within the confines of the Statute of Frauds, MCL 566.101, *et seq.*, because the contract sought to convey real property. Accordingly, the Court of Appeals declared the purchase agreement "void" under the Statute of Frauds or MCL 555.21. (12a)

The Court of Appeals Opinion is clear that the Defendant could not rely upon MCL 700.7404 to enforce the purchase agreement since he was not dealing with both co-trustees appointed by the trust. (13a)

UNDISPUTED FACTS

1. Norman John Sinclair, deceased, established a living revocable trust in Oakland County, Michigan, on March 27, 1996. (14a, Trust Agreement, and 53a, Certificate of Trust Existence and Authority) Norman John Sinclair passed away on December 30, 2000.

2. Upon the death of their father, Plaintiffs-Appellees, Barbara Sue Traxler and Norma Jean Castle, maintain that they became successor co-trustees of the Norman John Sinclair Trust pursuant to (1) the Trust Agreement—Section VII, Paragraph 7.3,(37a) and (2) the Certificate of Trust Existence and Authority—Paragraph 2. (53a)

3. As set forth in the Affidavit of Norma Jean Castle submitted with Plaintiff-Appellees' Motion for Summary Disposition as Exhibit F and therefore a part of the record, Norma Jean Castle was from the time appointed co-trustee always and at all times able and willing to act as co-trustee. (100a, Affidavit of Norma Jean Castle, Paragraph 5) This Affidavit is uncontested.

4. Plaintiff-Appellee, Barbara Sue Traxler, is a truck driver. Her sister, Plaintiff-Appellee, Norma Jean Castle, is a homemaker. Defendant-Appellant, Shire Rothbart, is retired from the Taubman Company, where he was employed since 1963. The Defendant-Appellant was the Senior Vice-President at the Taubman Company at the time he retired. The Defendant-Appellant held the position of Senior Vice-President for 20 years. The Defendant-Appellant reported directly to A. Alfred Taubman. Defendant-Appellant now is engaged as a consultant in the area of business and real estate finance. The Defendant-Appellant is also a partner in at least two real estate development projects.

5. The Norman John Sinclair Trust holds title to property located at 2682 Walnut Lake Road in West Bloomfield Township, Oakland County, Michigan. This property was the residence of Mr. Sinclair during his lifetime. A home sits on the property, which consists of

3.58 acres. This property is the home of Plaintiff-Appellee co-trustee Norma Jean Castle, who lives in the home with her husband and two grandchildren. (99a, 100a, Affidavit of Norma Jean Castle)

6. Norman John Sinclair's health failed him in the final years of his life. Mr. Sinclair lived with his daughter, Norma Jean Castle, who was his caretaker, until the time of his death. His other daughter, Plaintiff-Appellee Barbara Sue Traxler, was appointed his legal guardian during his time of ill health. (82a, deposition transcript of Barbara Sue Traxler, p. 6, l. 11-19)

7. Less than three months after their father's death, Defendant-Appellant's written offer to purchase the property for $430,000.00 was presented to Barbara Traxler. (58a, purchase offer) The record is devoid of any evidence that Barbara Traxler "undertook to sell the property" after the death of her father in December 2000. (Defendant-Appellant's Brief, p. 2) Barbara Traxler's testimony is uncontested that at the time the offer by Defendant-Appellant was made, the property had not been appraised and had not been placed on the market for sale. (84a, deposition transcript of Barbara Sue Traxler, p. 16, l. 5-9) Barbara Traxler signed the offer, but her sister and co-trustee, Norma Jean Castle, refused to sign the offer, not wanting to sell the property for the purchase offer price.

8. Defendant-Appellant knew that the property was held in trust. Defendant's knowledge in this regard is evidenced by the fact that the signature block for the seller on the purchase offer he prepared indicated in pre-printed type that Barbara Traxler would accept the offer as successor trustee of the Norman John Sinclair Trust.

9. Mr. Rothbart met with Barbara Traxler in person on March 31, 2001, at a Big Boy Restaurant on Orchard Lake Road and Maple Road in West Bloomfield. Barbara Traxler

incorrectly assumed that she had authority to enter into an agreement for the sale of the property based on her guardianship, which became ineffective upon her father's death. (87a, deposition transcript of Barbara Traxler, p. 27, l. 14-25; p. 28, l. 1-14) At this meeting, Mr. Rothbart specifically inquired of Ms. Traxler whether she had authority to enter into the contract. The following is taken from the sworn deposition testimony of Defendant-Appellant Shire Rothbart:

> A. I sat across the table from her in a Big Boy Restaurant on Orchard Lake and Maple.
> . . .
>
> A. I asked her—I think I phrased it, I presume you have the authority to enter into this contract; she said yes. And I said is there something because—she said—she was the trustee. And I said do you have something that—either from the court or your father that appoints you a trustee, and she pulled out a piece of paper, and what it was, as I believe, was her acceptance of a guardianship of her father. I then said to her, look, this is your acceptance of the guardianship, but I don't see anything here that says you are the trustee, you are telling me you are the trustee. She says, I have that at home. I said okay, and that was the end of the discussion on that subject. I accepted what she said to me at face value.
>
> Q. So that was at the meeting that she gave you the—
>
> A. Specifically she showed me the piece of paper across the table and the paper with her acceptance of a guardianship, which I indicated was not an acceptance of a trusteeship.

(9b, 10b, deposition transcript of Deposition of Shire Rothbart, pp. 33, 36 and 37)

The Defendant-Appellant continues:

> A. . . . What I did recognize was her acceptance of a guardianship *was not enough to convince me that she had the authority to sell* the property without a piece of paper offering it to her.
>
> Q. Did she ever give you any other documents?
>
> A. No, she said to me she had it with her at home and didn't have it with her.

(13b, deposition transcript of Deposition of Shire Rothbart, p. 51)
Emphasis Added

Evidence was presented in the form of an Affidavit of expert Thomas W. Payne, Esq., and it is uncontested that a title company would require to review the trust document or the certificate of Trust Existence and Authority to ensure that the parties signing the agreement did in fact have authority to sell the property before issuing marketable title. (98a, Affidavit of Thomas W. Payne, Esq., Paragraph 10(e)(3)).

10. Aside from Defendant-Appellant's knowledge of real estate, the Defendant-Appellant owns property and lives in the area surrounding the property which is the subject of this action. The property for which Mr. Rothbart offered to purchase for $430,000.00 was appraised at the time for $595,000.00 and up to $800,000.00 if split. (18b, appraisal)

DISPUTED FACTS

Appellees take great exception to the Appellants' Statement of Facts as being in violation of Michigan Court Rules. MCR 7.306(A) and 7.212(C)(6) provide that a brief to this Court must contain a Statement of Facts—"All material facts, both favorable and unfavorable, must be fairly stated without argument or bias." An attempt to slant facts or to couch the facts in a manner to favor one's position can be tolerated, but to simply state as undisputed facts which are at issue is unacceptable. The Appellant states as "fact" that the trust agreement does not require the trustees to act jointly (Appellant's Brief--Statement of Facts. p. 1, paragraph 4), and that Barbara Traxler acted as the sole trustee and that her sister, Norma Jean Castle, was not a co-trustee. (Appellant's Brief--Statement of Facts, p. 2) Nothing could be further from the truth. Appellant ignores the fact that in the only other exercise of authority, other than the ministerial acts, which was the sale of other real property

owned by the trust, *both* Barbara Traxler and Norma Castle executed the purchase agreement. (83a, deposition transcript of Barbara Sue Traxler, p. 12, l. 15-25; p. 13, l. 1-18) Not only are these factual issues contested, the trial court and the Court of Appeals disagreed with these interpretations argued by the Appellant. Not only is the status of the trustees disputed, i.e., whether the trust agreement provided for the trustees to act jointly or not, the entire issue of whether there was a purchase agreement is disputed. The Appellees have always maintained that there was never a binding purchase agreement. It is this fact, admittedly disputed, that is the basis for which the Appellant's entire argument fails.

1. Although it is undisputed that the Trust Agreement provides for successor co-trustees, it is disputed that the Trust Agreement grants authority for one co-trustee to bind the Trust without the other co-trustee's consent. The Appellant argues that certain language in other sections of the trust agreement confers sole authority on each co-trustee to bind the Trust without the other. Appellees maintain that the Appellant argues language in the Trust Agreement out of context, contrary to normal custom and usage and contrary to well-settled law. Appellees did provide the trial court with an Affidavit of an expert, Thomas W. Payne, Esq., to assist with the interpretation of the Trust Agreement if found ambiguous and to assist the court in understanding normal custom and usage. Mr. Payne's Affidavit was uncontested, the Appellant having provided no contradictory evidence.

2. It is disputed that Barbara Traxler was the sole trustee. Barbara Traxler was the legally appointed guardian of her father before his death. (82a, deposition transcript of Barbara Traxler, p. 6, l. 11-19) Apparently, Ms. Traxler continued to pay the electric bill and perform other such tasks, but quite contrary to Appellant's assertions based on ministerial acts performed solely by Barbara Sue Traxler, Norma Jean Castle was, and is, always able and

willing to act. This fact is set forth in the Affidavit of Norma Jean Castle, which has gone uncontested by the Appellant. (99a, Affidavit of Norma Jean Castle) Also, as noted above, there was another sale of trust property and the purchase agreement for that sale was in fact signed by both Bárbara Traxler and Norma Jean Castle. (83a, deposition transcript of Barbara Traxler, p. 12, l. 15-25; p. 13) Even though Barbara Sue Traxler was uncertain as to the extent of her authority, she testified, at her sworn deposition, that she indicated to Mr. Rothbart at their meeting when she signed the purchase agreement that she wanted her sister's approval. When Norma Jean Castle learned of the offer, she immediately and unequivocally indicated she would not sell the property pursuant to the terms of the offer. (87a, deposition transcript of Barbara Traxler, pp. 26-30) It is undisputed that the Purchase Agreement, which provides a signature block for Barbara S. Traxler as successor trustee of the Norman John Sinclair Trust, was prepared by the Appellant, Shire Rothbart.

3. The existence of a valid purchase agreement is disputed. Although the Appellant, Shire Rothbart, presents his Statement of Facts as if a valid purchase agreement exists, this is absolutely at issue. There is no question that the Appellees maintain that there is no valid agreement. This is the ultimate issue for this Court. The trial court and the Court of Appeals did agree with the Appellees that there was no valid agreement.

STATEMENT OF STANDARD OF REVIEW

Defendant-Appellant moved for summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). Plaintiff-Appellees moved for summary disposition pursuant to MCR 2.116(C)(8) (the opposing party has failed to state a claim on which relief can be granted) and 2.116(C)(10) (no genuine issue of material fact).

In its decision, the Court of Appeals correctly treated the trial court's ruling as having granted Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(C)(10), and properly determined the standard of review to be *de novo*. (10a)

A decision granting summary disposition may be affirmed on the basis of reasoning different from the reasoning employed by the trial court. Otero v Warnick, 241 Mich App 143; 614 NW2d 177 (2000).

The party moving for summary disposition on the basis that there is no genuine issue of material fact bears the initial burden to support its position by affidavits, depositions, admissions, or other documentary evidence, and the burden then shifts to the non-moving party to establish that a genuine issue of disputed fact exists. MPC Cashway Lumber Co v Hull, 238 Mich App 441; 606 NW2d 392 (1999). Once the party moving for summary disposition has supported its position by documentary evidence, the burden shifts to the opposing party to set forth specific facts showing that a genuine issue of material fact exists. Abbott v John E. Green Co, 233 Mich App 194; 592 NW2d 96 (1998).

ARGUMENT

I. SUMMARY OF ARGUMENT

Plaintiffs-Appellees respectfully request that this Court affirm the Court of Appeals Decision and Opinion affirming the Oakland County Circuit Court's Opinion and Order declaring the subject purchase agreement null and void. The lower court's decisions are in accord with well settled principles of real property law relied upon in the conduct of real estate transactions. The decisions are also in accord with the statutes governing the administration of trusts.

This Honorable Court has asked the parties to brief the issue of whether a third party may enforce a purchase agreement where, without the third party's knowledge, the trustee exceeded the trustees authority by entering into the agreement. This issue arises from the language of MCL 700.7404 which Defendant-Appellant blindly argues entitles him to specifically enforce the subject purchase agreement for real property. The statute, however, simply does not apply to the case at bar for several reasons. First and foremost, there is no legally valid agreement to enforce. Since the purchase agreement is for real property, a prerequisite to the validity of the agreement is that it must satisfy the Statute of Frauds. Accordingly, the purchase agreement must be signed by all joint owners or those with joint authority to sell or it is otherwise absolutely void. Section 7404 presumes that the third party is dealing with the sole trustee or all trustees if there is more than one. The protection afforded by the statute to the third party is bonafide purchaser (BFP) status; however, the protection afforded a BFP in real estate transactions does not render an otherwise invalid agreement enforceable. The doctrine concerning BFPs arises in the context of competing purchasers, not as here, in the context of whether there was authority to sell a parcel of property. Accordingly, Defendant-Appellant's reliance on MCL 700.7404 is misplaced. Defendant-Appellant's proposed interpretation of Section 7404 not only conflicts with existing laws, but would create absurd results.

Plaintiff-Appellee Barbara Sue Traxler is not the sole trustee. In another attempt to seek the protection afforded by MCL 700.7404, Defendant-Appellant offers an interpretation of the language of the trust document that is simply not reasonable or in accord with normal custom and usage. The unambiguous language of the trust clearly appoints Barbara Sue Traxler and Norma Jean Traxler as co-trustees and does not provide, as Defendant-Appellant

suggests, that one trustee has the sole power to act. Both the trial court and Court of Appeals interpreted the plain meaning of the language of the trust as appointing co-trustees and nowhere providing that one trustee has the power to act alone. In addition to the unambiguous language of the trust, which was in accord with applicable law, evidence was presented through expert testimony that to accept the interpretation offered by Defendant-Appellant would conflict with the intent of the testator, since the language relied upon by the testator was that commonly and routinely used and relied upon in the preparation and administration of trust documents.

There is simply no legally recognizable agreement for the sale of real property. No matter how hard he tries, Defendant-Appellant cannot change rocks to bread. MCL 700.7404 cannot be relied upon to create a valid agreement from one that is absolutely void.

II. A THIRD PARTY MAY ENFORCE A PURCHASE AGREEMENT WHERE, WITHOUT KNOWLEDGE, THE TRUSTEE EXCEEDED THE TRUSTEE'S AUTHORITY BY ENTERING INTO THE AGREEMENT ONLY IF THERE IS A VALID AND BINDING AGREEMENT TO ENFORCE.

Appellant's argument for reversal of the Court of Appeals Opinion and Decision that the agreement for the sale of the property is null and void must fail because it is based upon a faulty premise, i.e., that there exists a valid agreement for the sale of real property. Appellant's reliance on the language of MCL 700.7404 for his argument that he may specifically enforce the agreement signed by only one of two co-trustees is simply misplaced. MCL 700.7404 provides:

> With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of a trust power and its proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee may act or is properly exercising the power.

> A third person, without actual knowledge that the trustee is exceeding a trust power or improperly exercising it, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the power the trustee purports to exercise. A third person is not bound to assure the proper application of trust property paid or delivered to the trustee.

To interpret this statute in accordance with other sections of Estates and Protected Individuals Code (EPIC) MCL 700.1101 *et seq.*, other relevant statutes related to the administration of trusts, the sale of real property, the conveyance of title, and in accord with the language of the subject trust and the intent of the testator, the Court of Appeals Opinion declaring the agreement null and void must be affirmed. When the statute references "trustee", it means the sole trustee or all co-trustees if there are more than one. To attempt to interpret the statute in any other way would cause conflict within EPIC, and conflict with existing laws upon which the practice of real estate has been built upon. In our case there can be no valid agreement for the sale of the property pursuant to well settled principles of law and the language of the trust itself.

A. The rule of law is that if there are two or more trustees, the powers conferred upon them can properly be exercised only by all the trustees, unless it is otherwise provided by the terms of the trust. Nichols v Pospiech, 289 Mich 324; 286 NW 633 (1939); MCL 700.7406.

The reason Defendant-Appellant's entire argument fails is because there was never a valid agreement for the sale of real property. Defendant-Appellant's entire argument rests on the premises that there was a valid agreement—this is incorrect.

Not only does the language of the Trust require both Co-Trustees to act jointly, as affirmed by expert, Thomas W. Payne, Esq., the general, well settled rule of law is that if there are two or more trustees, the powers conferred upon them can properly be exercised only by all of the trustees, unless it is otherwise provided by the terms of the Trust. Nichols v

Pospiech, 289 Mich 324; 286 NW 633 (1939); MCL 700.7406. Both statutory and case law support affirming the Court of Appeals Opinion affirming the trial court's Order granting Plaintiffs-Appellees' Motion for Summary Disposition and denying the Defendant-Appellant's Motion for Summary Disposition.

MCL 700.7406(4) provides, in pertinent part:

> Subject to subsections (1) to (3), all other acts and duties shall be performed by both of the trustees if there are two, or by a majority of the trustees if there are more than two.

Subsection 3 applies to ownership of securities, and is not at issue in the case at bar. Subsection 1 provides that if there are more than two trustees that the language of the trust agreement governs. Subsection 2 provides that if there is no governing provision in the trust instrument, co-trustees may provide, by written agreement signed by all of them and filed with and approved by the court where the trust would be registered . . . that any one or more of the powers . . . may be exercised by any designated one or more of the trustees. There has been no writing pursuant to Subsection 2 in our case relinquishing either of the Co-Trustee's powers. Based on MCL 700.7406 and the trust agreement at issue, both Co-Trustees, Norma Jean Castle and Barbara Sue Traxler, were required to execute the purchase offer for any valid sale of trust property. Since Norma Jean Castle did not execute the offer, there is no valid agreement and the Opinion of the Court of Appeals should be affirmed.

This well-settled rule of law is set forth in the case of Nichols, *supra*, which is controlling on the various issues in our case. So dispositive is this Michigan Supreme Court Opinion to our case that a copy of the Opinion was attached to Plaintiff-Appellees' Brief in support of their Motion for Summary Disposition at the trial court level. Just as in our case, Nichols dealt with the execution of a purchase agreement for real property by a trust of which

there were two co-trustees. However, in Nichols, the trust was the prospective purchaser of property. The plaintiffs in Nichols were the two co-trustees of a testamentary trust. The will contained the provisions relative to the powers of the testamentary trustees, which provided: "I give my executors and trustees the power to buy and sell real estate whenever they think it best and for the interest and good of the estate." The will went on to simply nominate the two trustees. In an act of investing for the trust, one of the trustees executed an offer to purchase certain real property from the Defendant, Pospiech, and made a $1,000.00 deposit. Both the one trustee and the defendant executed the purchase agreement and a check for $1,000.00 drawn on the funds of the trust estate payable to the defendant was delivered to defendant's attorney. On the following day, the other trustee was notified of the transaction. The other trustee disapproved of the transaction and requested from the defendant's agent a return of the deposit check. In demanding a return of the deposit check, counsel for the estate noted to the defendant that it was clear that the purchase offer was signed by a trustee on behalf of a trust, and that the deposit check was from a trust estate. Defendant was notified of the existence of a co-trustee who did not execute or otherwise authorize the offer to purchase the property. In fact, just as in our case, the other co-trustee declined to approve or ratify the offer or purchase. Therefore, the trust in Nichols maintained that the offer was not binding upon the trust, since the trust estate could only be legally bound by the act of both trustees. The deposit was not returned and the trust instituted the suit to recover the down payment.

Just as in our case, the defendant in Nichols argued, among other things, that the co-trustee that did not execute the agreement had in fact ratified the action of the co-trustee that did execute the agreement.

The case was tried to the bench and the trial court entered a judgment in favor of plaintiffs for the deposit plus incidental costs expended by the plaintiffs. The defendant moved for a new trial, which was denied, and the appeal followed. The Michigan Supreme Court affirmed the findings and conclusions of the trial court, entitling plaintiffs to recover of defendant their earnest money deposit plus interest.

The findings and conclusions of the trial court on the rendition of the judgment were substantially as follows: that the trust could not bind the trust estate without both co-trustees joining in the execution of the agreement that inasmuch as defendant did not plead ratification or estoppel, that such defense could not be considered; and, further, that the evidence did not establish ratification on the part of the non-signing co-trustee even though it was held that the signing co-trustee was an agent for the trust. *The Court also found that a ratification of the contract by the non-signing co-trustee would have to be in writing in order to satisfy the Statute of Frauds.* Nichols at 332, 333. The Plaintiff-Appellees contended that the Defendant-Appellant in making the contract had notice that she was dealing with a trust because the co-trustee who executed the contract indicated that he was executing as a trustee of a trust. The Plaintiff-Appellees maintain that any person dealing with a trustee must determine at his own risk the authority of such trustee to execute a proposed contract. The Michigan Supreme Court states, "We are in accord with this contention even though the defendant was not sufficiently familiar with the English language to enable her to testify without the aid of an interpreter." Nichols at 333. Therefore, the Supreme Court states that anyone knowingly dealing with a trust proceeds at his or her own risk, even when that person may not have fully understood the language referring to the trust. How much more does this caveat apply in our case, with a Defendant who is as sophisticated and knowledgeable in real

estate transactions as Shire Rothbart! The sum of the Michigan Supreme Court's holding in Nichols is set forth in the Opinion as follows, and is on point in our case:

> The transaction was in all respects fair and above board, and the parties should consider themselves bound by the intent and spirit of such transactions, and not seek to avoid them by reason of technicalities. The plaintiffs want their marble back, and because of the rules of law governing contracts by trustees, we are constrained to hold that defendant must account for the amount paid to her because one of the trustees refuses to be bound by the agreement entered into by his co-trustee in absolute good faith. Nichols at 334.

Our case is almost identical to Nichols, except the parties to the contract are switched—in our case the trust is the seller and the Defendant is the buyer. However, the concepts and issues in our case are remarkably identical to those in Nichols. Just as in Nichols, one of the Co-Trustees appointed by the Trust, Barbara Traxler, entered into a contract without the knowledge or authority of the other Co-Trustee, Norma Jean Castle. Just as in Nichols, when Norma Jean Castle was informed of the contract, she at once disapproved of it and refused to sell. The earnest money deposit given by the Defendant-Appellant (which was not even deposited due to Norma Jean Castle's immediate disapproval of the contract) was returned to the Defendant-Appellant. Just as in Nichols, the party attempting to enforce the agreement against the trust was placed on notice as to possible limitations on the authority of the trustee. In our case, the Defendant-Appellant inquired of Barbara Traxler whether she had sole authority to bind the Trust. In response, Barbara Traxler presented to the Defendant-Appellant her guardianship papers which the Defendant-Appellant actually expressed was not an acceptance of a trusteeship. The Defendant-Appellant knew that Barbara Traxler had a sister who lived on the property and probably shared equal authority over the father's estate. Barbara Traxler has testified that she indicated to the Defendant-Appellant that she wanted to

obtain her sister's authority. (87a, deposition transcript of Barbara Traxler, pp. 28, 29 and 30) The Defendant-Appellant cannot in good faith argue that he assumed the person that he was dealing with had sole authority to bind the trust. If truth be told, the Defendant-Appellant knew better than Barbara Traxler that she did not have the sole authority to bind the trust.

B. The agreement is void pursuant to "The Law of Uses and Trusts" MCL 555.21.

Since Barbara Traxler did not have the sole authority to bind the trust, the contract is void. As set forth in The Law of Uses and Trusts, MCL 555.21, "When the trust shall be expressed in the instrument creating the estate, every sale, conveyance, or other acts of the trustees, in contravention of the trust, shall be absolutely void." The sale of the property by Barbara Traxler without the authorization of Norma Jean Castle would be in contravention of the trust. Accordingly, pursuant to MCL 555.21, the sale is void. The Defendant-Appellant cannot enforce a void contract.

C. The agreement is void under the "Michigan Statute of Frauds", MCL 566.106, .108.

The Opinion of the Court of Appeals should be affirmed because the contract is void under the Statute of Frauds. The Defendant-Appellant's assertion that the agreement satisfies the Statute or Frauds cannot be made with a straight face. We are dealing with a sale of real property, and the purchase agreement must be signed by all joint owners or those with joint authority to sell, or is otherwise absolutely void. Forge v Smith, 458 Mich 198 (1998); Fields v Korn, 366 Mich 108; 113 NW2d 860 (1962); Adler v Katus, 190 Mich 86; 155 NW 707 (1916); MCL 566.106, (4b) .108 (5b).

Where a real estate sales contract falls within the statute of frauds, it is void. MCL 566.108. It cannot be used for any purpose. Wardell v Williams, 62 Mich 50; 28 NW 796

(1886). It cannot be used to measure damages or establish consideration. Van Camp v Van Camp, 291 Mich 688; 289 NW 297 (1939); Thorbahn v Walkers Estate, 269 Mich 586; 257 NW 892 (1934).

To accept the Defendant/Appellant's interpretation of Section 7404 would render that statute in conflict with the statute of frauds for real estate. Defendant/Appellant argues that Section 7404 creates an exception to the statute of frauds, stating at page 26 of his brief that, "Since Section 7404 was enacted in 1998, long after the statute of frauds, and addresses a more specific situation then the statute of frauds addresses, Section 7404 would control if there is a true conflict between section 7404 and the statute of frauds." First, Defendant/Appellant ignores the fact that the language of Section 7404, which took effect on April 1, 2000, as part of EPIC, is virtually identical to the repealed MCL 700.833, with the only differences being stylistic. MCL 700.833 provided:

> With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust powers and their proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee may act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise. A third person is not bound to assume the proper application of trust assets paid or delivered to the trustee.

MCL 700.833, which was part of the Revised Probate Code, was in effect from July 1, 1979, until April 1, 2000.

The Court of Appeals in its Opinion correctly addresses this issue of "conflict":

> It is a well-recognized principle that the legislature is presumed to be cognizant of all existing statutes when enacting new legislation. Jenkins v Patel, 256 Mich App 112, 126; 662 NW2nd 453 (2003). Only when conflict exists between two

> statutes should the one that is more specific to the subject matter prevail. In re Brown, 229 Mich App 496, 501; 582 NW2d 530 (1998). If two statutes lend themselves to interpretation that do not conflict, that construction should control. Travlers Ins. v U-Haul of Michigan, Inc., 235 Mich App 273, 280; 597 NW2d 235 (1999). The statute of frauds and the Estates and Protected Individual Code are neither contradictory nor conflicting. MCL 566.106 and MCL 566.108 define the requirements for a conveyance in property. MCL 700.7406(4) merely defines who the party to be charged is when co-trustees are involved, while MCL 555.21 addresses the validity of the agreement if the formalities and requirements of a trust are not adhered to. As such, the statutes are quite capable of consistent and non-conflicting interpretation. (12a-13a)

Defendant/Appellant's proposed interpretation of MCL 700.7404 is simply overreaching in an attempt to obtain the outcome he desires. Such an interpretation clearly is contrary to the plain language and intent of the statute interpreted under the usual terms of construction.

D. Since marketable title cannot be conveyed by one of two active trustees, the agreement is null and void.

The Circuit Court properly held that title to the property could not be conveyed to the Defendant-Appellant without the signature of both co-trustees. The trial court in its Opinion and Order states, ". . . there is no question of fact that the plaintiffs cannot convey marketable title to the defendant as required by the agreement, making the agreement null and void." (9a) The trial court's holding that the agreement is null and void since the Plaintiffs cannot convey marketable title is axiomatic given the requirement of the Trust Agreement that both co-trustees must act to convey trust property and the application of the statute of frauds and MCL 700.7406(4). In so holding, the trial court references, among other things, Michigan Land Title Standard 8.4, which was attached to the Plaintiff-Appellees' Motion for Summary Disposition. (28b, Michigan Land Title Standard 8.4) This Standard provides that all

surviving trustees must unite in executing a deed pursuant to a power of sale contained in a valid, recorded trust unless the trust instrument authorizes less than all to convey. In other words, title held by a trust cannot properly be conveyed without the signatures of all co-trustees of the trust, unless so provided in the trust agreement. It is interesting to note that the Michigan Land Title Standard 8.4 references as authorities Nichols v Pospiech, supra, and MCL 700.833. Clearly, 700.7404 does not abrogate Nichols and all prior law as the Defendant-Appellant maintains.

The agreement at issue calls for the conveyance of marketable title from the Trust to the Defendant-Appellant. Every real estate sale contract should recite the quality of title to be conveyed, but unless there is an agreement to the contrary, a seller of real estate must convey "merchantable" or "marketable" title. Weaver v Richards, 144 Mich 395; 108 NW 382 (1906); CF. Madhaven v Sucher, 105 Mich App 284; 306 NW2d 481 (1981). Accordingly, without the signature of both co-trustees in our case, marketable title could not be conveyed.

Without the signature of both co-trustees necessary to convey marketable title, the agreement cannot be specifically enforced. Our situation is analogous to a situation in which one spouse agrees to sell property that is protected by Michigan's homestead laws, that is held as entireties property, or in which a wife has a dower interest. In all such instances, the contract is void for the purpose of granting specific performance. Joyce v Vemulapalli, 193 Mich App 225; 483 NW2d 445 (1992) (citing Lamberts v Lemley, 314 Mich 417; 22 NW2d 759 (1946); Tamplin v Tamplin, 163 Mich App 1; 413 NW2d 713 (1987); and Berg-Powell Steel Co v The Hartman Group, 89 Mich App 423; 280 NW2d 557 (1979)).

The Defendant-Appellant argues that the Circuit Court's holding is improper because the court has power to quiet title. (104a) It is not disputed that the Court has power to quiet

title, but only when it is determined that a person claiming a right, title or interest in land, including the right to possession, has valid title. Furthermore, the Defendant-Appellant did not bring a quiet title action pursuant to MCL 600.2932.

III. MCL 700.7404 IS INAPPLICABLE TO THE FACTS OF OUR CASE.

A. In accordance with established law, MCL 700.7404 assumes the third party is dealing with the sole trustee or all co-trustees if more than one.

The statute presumes and contemplates a situation where *the* trustee with whom a bonafide purchaser is dealing is *the only* trustee or trustees, and that the statute therefore should not apply in this case where the purchaser dealt with less then all of the trustees.

There is no question but that the statutes' reference to the "trustee" in the singular can be used to refer to all persons occupying the position of trustee, whether one or more. This is in accord with how our statutes are to be construed. Chapter I of the statutes, MCL 8.3b, provides, in pertinent part:

> **8.3b Singular and plural; gender.**
> Every word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number.

The use of the singular form of the word "trustee" to embrace the plural when the situation so requires in the statute is also how the word is utilized in the trust document. As to its use in the trust document, this is described in greater detail below whereby the trust document itself expresses that the word "trustee" refers *collectively* to the co-trustees. The use of the singular form of the word in this manner is made clear in Section X, Part 10.6(E) of the trust entitled "Definitions." (51a)

When the use of the word trustee is interpreted to include the plural then section 7404 can be interpreted without conflict with other statutes and thus in accord with the general rules

for statutory construction. Furthermore, in construing the word "trustee" to include others also satisfies the rules of construction of EPIC itself of which Section 7404 is a part of. MCL 700.1201, provides:

> **700.1201 Purposes; rule of construction.**
> This act shall be liberally construed and applied to promote its underlying purposes and policies, which include all of the following:
> (a) To simplify and clarify the law concerning the affairs of decedents, missing individuals, protected individuals, minors, and legally incapacitated individuals.
> (b) To discover and make effective a decedent's intent in distribution of the decedent's property.
> (c) To promote a speedy and efficient system for liquidating a decedent's estate and making distribution to the decedent's successors.
> (d) To facilitate use and enforcement of certain trusts.
> (e) To make the law uniform among the various jurisdictions, both within and outside of this state.

Obviously, in construing the statutes, of utmost importance is the purpose, "To discover and make effective a decedents intent..." MCL 700.1201(b). In our trust document, as set forth in detail below, as well as documents which have been utilized for decades and are currently in use, the singular form of the word "trustee" is used collectively to refer to co-trustees if there are more than one. To interpret the statute in a different way then the trust documents would be incongruous and would lead to results whereby the intent of the testator is not followed.

All of the cases cited by Defendant-Appellant interpreting the corresponding statute to section 7404 from other jurisdictions support a holding that the reference to "trustee" in the statute refers to all co-trustees if more than one. The various cases from other jurisdiction are distinguished below; however, for the purpose of this particular issue, it is insightful to note that in each case the bonafide purchaser was in fact dealing with or effectively dealing with all

trustees. In Adler v Manor Health Care, 7 Cal App 4th 1110; 9 Cal Rptr 2d 732 (1992), the BFP was dealing with a single trustee. Again, in Vournas v Fidelity National Title Insurance Company, 73 Cal App 4th 668; 86 Cal Rptr 2d 490 (1999), the BFP was dealing with a sole trustee. In Wetherill v Bank IV Kansas, 145 F3d 1187 (1998), there was only one trustee. The only other case cited by Defendant/Appellant for the purpose of interpreting Section 7404 is Gleason v Elbthal Realty Trust, 122 NH 411; 445 A2d 1104 (1982). In Gleason, there were three trustees and the agreement was signed by only one; however, the opinion is clear that the various individuals, as co-trustees, "acted in concert when agreeing to sell." (148,a,Gleason at 415) Accordingly, and once again, the purchaser in dealing with the "trustee" was dealing with all co-trustees.

To accept the Defendant-Appellant's argument that only one, when there are two or more co-trustees, can bind the trust to sell real property would lead to absurd results. If Defendant-Appellant's argument were accepted, then one co-trustee could bind the trust to a purchase agreement with party "A" that could be specifically enforced by party "A". In the meantime, the other co-trustee could bind the trust to a purchase agreement for the same property to another purchaser, party "B," that could be specifically enforced by party "B". In our case, if Norma Castle had executed a purchase agreement with someone other then Defendant-Appellant during the pendency of the sale, then the second purchaser could seek to enforce the sale against the trust by virtue of Norma Castle's action. Title insurance companies would be having nightmares. Defendant-Appellant's interpretation is simply not reasonable.

B. The Statute of Frauds is alive and well — MCL 700.7404 does not abrogate the Michigan Statute of Frauds and does not render an invalid agreement enforceable.

Defendant-Appellant's reliance upon MCL 700.7404 for his position that even if the trust instrument required the approval of both co-trustees the agreement nonetheless is valid and enforceable is erroneous and misplaced. The Defendant-Appellant uses the language of MCL 700.7404 to hold himself out as a bona fide purchaser (BFP). Any argument made by the Defendant-Appellant that the protection afforded by the statute is something other than BFP is simply incorrect. In fact, Defendant-Appellant argued at the trial court that he wanted the court to find he was a BFP. (104a, February 27, 2002 hearing transcript, L. 20-22.) The Adler opinion relied upon by the Defendant-Appellant makes it crystal clear that the protection afforded by this statute is that of a BFP. (124a, 125a, 128a) Defendant-Appellant's reliance on this statute is erroneous because the protection afforded a BFP in real estate transactions does not render an otherwise invalid agreement enforceable. Such a holding would render valid and binding transactions in which the instrument by which the purchaser takes is a forgery, and this is contrary to established law. Horvath v National Mortgage Co, 238 Mich 354; 213 NW 202 (1927); Austin v Dean, 40 Mich 386 (1879); Vanderwall v Midkiff, 166 Mich App 668; 421 NW2d 263 (1988). This Court has long held that if a forged deed is the basis for a chain of title, those who innocently acquire interest in it are in no better position as to the title than if they had purchased with notice. Skupinski v Provident Mortgage Co, 244 Mich 309; 221 NW 338 (1928).

Accordingly, Defendant-Appellant's reliance on MCL 700.7404 is misplaced. The doctrine concerning bona fide purchasers arises in the context *of competing* purchasers, not, as here, in the context of whether there was authority to sell a parcel of property. MCL 565.29; Church of God in Christ, North Central Jurisdiction of Michigan v City of Lansing, unpublished Opinion per curium of the Court of Appeals, decided Dec. 17, 2002 (Docket No.

236750) citing Graves v American Acceptance Mortgage Corp, 246 Mich App 1, 5; 630 NW2d 383 (2001). A copy of the Court of Appeal's unpublished Opinion per curium in Church of God in Christ is attached at 31b. The ruling provides guidance for our case. In Church of God in Christ, the defendant City of Lansing purchased property from the plaintiff, Church of God in Christ, North Central Jurisdiction of Michigan, through an authorized representative from a local parish, Reverend Walter Osborn. Reverend Osborn completed the sale, and signed a warranty deed to the City in his capacity as pastor and chairman of the local parish. Reverend Osborn absconded with a portion of the proceeds of the sale and plaintiff brought the action to quiet title. Plaintiff established a prima facie case by showing that the by-laws of the local church provided that real property was held in trust for the jurisdictional church, and the property could not be sold without the authorization of the Bishop of the jurisdictional church. The chain of authority established by the churches was authorized by statute.

The Court of Appeals first held that the necessity of a written authorization to bind a party to an agreement signed by a third party is clearly set forth in the Statute of Frauds. Reverend Osborn did not have the authority to sell the property. The defendant attempted to argue that it was a bona fide purchaser for value without notice. The Court of Appeals held that the doctrine concerning bona fide purchasers arises in the context of competing purchasers, not in the context of whether there was authority to sell a parcel of property. The Court of Appeals held that the case was in fact comparable to one where a person attempts to transfer property through forgery with the true owner having no intention to sell the property. Accordingly, this Court granted the plaintiff's motion quieting title.

The well-established principles of law followed in the Church of God in Christ case apply to our case. Just as in the Church of God in Christ case, there is a statutory scheme for the administration of trusts and establishing the manner and conditions under which a trust can dispose of property. MCL 700.7101, et seq. Just as how the Reverend did not have authority to sell the church's property pursuant to the governing by-laws, one co-trustee in our case, Barbara Sue Traxler, did not have authority to sell the property according to the Trust Agreement. Just as how the City of Lansing could not render an invalid transfer of property valid by claiming that it was a BFP, the Defendant-Appellant in our case cannot render an invalid purchase agreement valid by claiming he that entered into the agreement without notice.

If Defendant-Appellant were entitled to prevail on his argument that the sale must be specifically enforced pursuant to 700.7404, then any individual can simply represent (or misrepresent) that he is a trustee of a trust and actually sell trust real property to others. This appears absurd, but in truth would be the case if the Defendant-Appellant were correct in his reliance on MCL 700.7404. The only possible interpretation of MCL 700.7404 is that is presumes a valid and binding agreement. MCL 700.7404 assumes that the parties to the agreement have the ability to legally transfer good title and that there are no issues with the statute of frauds. MCL 700.7404 assumes that the parties to the agreement have the ability to enter into a contract that the law observes as legally binding.

There is a distinction between exceeding authority and not possessing legal authority or ability. Section 7404 protects third parties when they are dealing with one who has exceeded authority; however, not when one does not have even the capability to enter into an agreement that the law will observe. To accept that there is no distinction would allow a third

party to create a contract when such could not normally exist. The Defendant-Appellant would like us to believe that this particular statute exists in a vacuum with no regard to all other existing laws. To accept such an interpretation would create chaos.

In reliance on MCL 700.7404 in support of his argument that the agreement should be specifically enforced, the Defendant-Appellant has relied on the case of Adler v Manor Health Care Corp, 7 Cal App 4th 1110; 9 Cal Rptr. 2d 732 (Cal. App. 1992) (124a). Adler is a California court's interpretation of an identical statutory provision. Our case at bar is distinguishable from the Adler case where there was a *single* trustee who had the power to convey trust property but had exceeded the trust requirement of obtaining a federal agency's prior approval of the transfer. In Adler, there was no question regarding the ability of the trustee legally to transfer good and valid title and, therefore, no issue involving the statute of frauds. Here, there are co-trustees, and the conveyance by one trustee simply cannot convey good title under Michigan's Statute of Frauds. Adler is further distinguishable from this instant case because in its analysis the Adler court found it significant that California had repealed a former section declaring absolutely void any transfer of real property in contravention of a trust. Adler at 1116. In contrast, Michigan has not repealed a similar law which states:

> When the trust shall be express in the instrument creating the estate, every sale, conveyance, or other acts of the trustees, in contravention of the trust, shall be absolutely void. MCL 555.21.

In sum, the California court in Adler specifically enforced a legally valid and binding agreement. In our case, there is no legally valid and binding agreement to enforce. In Adler, the contract was not authorized although the sole trustee entered into a legally binding

contract. In our case, Barbara Sue Traxler, as one of two active co-trustees could not without the other co-trustee's signature enter into a legally binding contract.

The Defendant-Appellant also cites Vournas v Fidelity National Title Ins Co, 73 Cal App 4th 668; 86 Cal Rptr 2d 490 (1999)(132a). The sole trustee in Vournas had the ability to enter into a binding contract; however, he was to obtain the consent of at least two beneficiaries before *he* sold the property. The distinguishing factor is that he did in fact have the ability to enter into a legal binding contract for the sale of the property.

IV. PURSUANT TO THE EXPRESS TERMS OF THE TRUST, THERE COULD BE NO VALID AGREEMENT FOR THE SALE OF REAL PROPERTY WITHOUT THE SIGNATURE OF CO-TRUSTEE NORMA JEAN CASTLE.

The trial court found that the Trust appointed Barbara Sue Traxler and Norma Jean Castle as co-trustees and that the Trust did not give only one trustee, when two are acting, the authority to enter into the purchase agreement. The trial court noted that the Defendant-Appellant failed to provide any evidence or an affidavit contradicting the Affidavit of Norma Jean Castle, stating that she was at no time unwilling to act as co-trustee. Accordingly, the trial court properly found that without Norma Jean Castle's signature, marketable title could not be conveyed and the agreement was null and void.

A. Barbara Sue Traxler and Norma Jean Castle were appointed successor co-trustees of the Norman John Sinclair Living Revocable Trust, Dated March 27, 1996 ("the Trust").

Norma Jean Castle and Barbara Sue Traxler were appointed Successor Co-Trustees of the Norman John Sinclair Living Revocable Trust dated March 27, 1996. The appointment of both Plaintiffs as Successor Co-Trustees is made pursuant to the clear and unequivocal

language of the Trust. (14a) The appointment of Successor Trustee is set forth in Section 7.3 of the Trust as follows:

> 7.3 **Successor Trustee**
>
> a. **Nomination and Acceptance**
>
> Upon the Grantor's death, incapacity, or resignation from the office of Trustee, when I am unable to serve as Trustee or as a co-Trustee on account of incapacity as provided below, or if I fail to select in writing a successor Trustee within 30 days after receipt of knowledge of the then sole Trustee's resignation or refusal to act, ***the first two*** **of the following, able and willing to act, shall become successor co-Trustees: First, my daughter above named, NORMA JEAN CASTLE. Second, my daughter, BARBARA SUE TRAXLER.** . . . (Emphasis added)
> (37a)

In addition to the language contained in the Trust document itself, the Certificate of Trust Existence and Authority (53a) contains the following:

> 2. I am currently the [sole] Trustee of the NORMAN JOHN SINCLAIR Trust Agreement. The successor trustees named in the Agreement are NORMA JEAN CASTLE of Harrison and West Bloomfield, Michigan and BARBARA SUE TRAXLER, of Westland, Wayne County, Michigan. (53a)

There can be no question from the language of the Trust documents that both Norma Jean Castle and Barbara Sue Traxler are Successor Co-Trustees.

B. Both co-trustees at all times were willing and able to act and co-trustee Norma Jean Castle never revoked her authority.

There is no question that both Norma Jean Castle and Barbara Sue Traxler were, and are, able and willing to act. Quite contrary to Defendant's assertions based on ministerial acts performed solely by Barbara Sue Traxler, Norma Jean Castle was, and is, able and willing to act. The fact that she will not sign the purchase agreement does not mean that she is unable to sign the purchase agreement—she simply refuses to sell the property to the Defendant. At 99a is the Affidavit of Norma Jean Castle whereby Ms. Castle attests to her authority and her

willingness and her ability to act. As set forth in the trial court's Opinion and Order, the Defendant-Appellant has failed to provide evidence or an affidavit stating otherwise. (Exhibit 9a, lower court Opinion and Order dated June 13, 2002, p. 9) The Court of Appeals Opinion affirms that, "Castle's unwillingness to agree to convey the property to Defendant does not equate to an unwillingness to act as a co-trustee". (11a) The Court of Appeals also notes that no evidence was ever produced of Castle's written resignation as co-trustee, as required by the trust or in accordance with MCL 555.25. (11a) Furthermore, the Court of Appeals also notes Castle's Affidavit and Defendant's failure to come forward with any documentary evidence to contradict Plaintiff's proofs. (11a) Even though Barbara Sue Traxler was uncertain as to the extent of her authority, she has testified at her sworn deposition that she indicated to Mr. Rothbart at their meeting when she signed the purchase agreement that she wanted her sister's approval. When Norma Jean Castle learned of the offer, she immediately and unequivocally indicated she would not sell the property pursuant to the terms of the offer. (87a and 88a, deposition transcript of Barbara Sue Traxler, pp. 26, 27, 28, 29 and 30)

Defendant-Appellant's assertion in his Brief on Appeal as "fact" that "Traxler acted as the sole trustee of the trust" is in error. (Defendant-Appellant's Brief on Appeal p. 2) Although Traxler established a bank account for the Trust and was the sole signatory on the account, duties flowing from her role as guardian, these acts alone do not supersede the general rule of law and the language of the Trust and make Barbara Traxler a sole trustee. When there are several co-trustees, they all form one collective trustee and must perform their duties in their joint capacity, especially when the matter involves an exercise of discretion and judgment in contradistinction to acts of a mere ministerial nature. Nichols v Pospiech, 289 Mich 324; 286 NW 633 (1939). The Court of Appeals affirms that Michigan case law

recognizes a distinction between the exercise of authority by a trustee from acts that merely facilitate administration and management of a trust. (11a and 12a) There is no question that the selling of the trust real estate, which is the most significant asset in the Trust, is a matter that involves an exercise of discretion and judgment and could only be performed by the exercise of both trustees. Paying the electric bill on behalf of the trust is an act of a ministerial nature. Because Barbara Sue Traxler paid the electric bill without her sister's involvement does not work to release Norma Jean Castle from her rights and responsibilities under the Trust.

Defendant-Appellant also ignores Barbara Traxler's testimony that in the only other significant act (up to the time of the deposition) of the trust, which was the selling of another piece of property owned by the trust, both Barbara Traxler and her sister, Norma Castle signed the purchase agreement:

Q So my question is: Has the trust had to do anything since his death to transfer or convey or sell any of these parcels of property?

A We sold one piece of property.

Q Okay. Which one is that?

A Government Lot 2 to pay his estate taxes.

Q All right. And when was that sold?

A In—

MR TOMA: Just answer as best as you can.

THE WITNESS: Maybe a couple of months ago. I can't really remember.

BY MR. HANLEY:

Q And who was that sold to?

A Charles Lyman.

Q Charles Lyman?

A. Right.

Q How do you spell his name?

A L-A-Y-M-A-N, I believe.

Q Okay. That makes sense.

A And I don't know the address.

Q Now, was there a purchase and sale agreement that was signed?

A Yes.

Q And was the trust the vendor of the property, the seller of the property?

A I don't know.

Q Well, who – let me start more basic. Who signed the agreement?

A My sister and I.

(83a, deposition transcripts p. 12, l. 15-25) (84a, deposition transcripts p. 13, l. 1-18)

Defendant-Appellant cites Gaynier v Ginsberg, 715 SW2d 749 (Tx App 1986)(150a) in support of his argument that the Trust Agreement contemplates, and the law requires, that a nominated successor trustee accept her appointment as such. (Defendant-Appellant's Brief on Appeal, p. 19 and 20) Not only is Defendant-Appellant's argument not supported by the language of the Trust or Michigan law, it is inapplicable to the facts of our case. In Gaynier, the court found a possible fiduciary relationship existing because the defendant was a co-trustee and the evidence supporting the finding that defendant was a co-trustee was his actions on behalf of the trust. In our case, *it is uncontested* that Norma Jean Castle was appointed a co-trustee and was at all times able and willing to act as a co-trustee. The argument that there may be a lack of evidence that Norma Jean Castle was a co-trustee because she did not sign

the subject agreement is absolutely ludicrous. She did not sign the agreement because she did not want to sell the property, not because she could not sign the agreement. In fact, as saw above from the deposition of Barbara Sue Traxler that in the only other sale of Trust real property Norma Jean Castle did in fact sign the purchase agreement with her sister.

The Defendant-Appellant also cites Rulon-Miller v Carhart, 544 A2d 340 (ME. 1988)(160a) in which one of two co-trustees was found to be the agent and have the authority to act for the trust, including real estate transactions. In Rulon, however, the other co-trustee testified that the other had the sole authority. In our case, the evidence is to the contrary. Co-trustee Norma Jean Castle has never relinquished her authority.

Fortunately, in Michigan there is a statutory mechanism for a co-trustee to relinquish authority. MCL 700.7406 Powers Exercisable by one or More Trustees, Subsection (2) provides:

> If there is no governing provision in the trust instrument, co-trustees may provide, by written agreement signed by all of them and filed with and approved by the court where the trust would be registered, as determined in accordance with Section 7101, that any one or more of the powers designated in Section 7401 may be exercised by any designated one or more of the trustees.

There is no comparable revised probate code or uniform probate code provision. As will be discussed below, case law and Section 7406 provide that when there are two or more co-trustees, unless otherwise provided in the trust agreement, all co-trustees must act on behalf of the trust. If a trust agreement does not have a provision governing exercise of powers by multiple trustees, co-trustees may agree in a writing, *which is filed with and approved by the court*, that certain powers will be exercised by less than all of them. No such

writing exists in our case whereby Norma Jean Castle's authority was revoked or delegated to her sister.

C. The Court of Appeals did not err in affirming the trial court's finding that the Trust Agreement did not give authority to only one of the co-trustees to enter into the purchase agreement.

The language of the Trust sets forth the rights, powers and duties of the Trustees and requires the Trustees to perform their duties in their joint capacity. Section VIII of the Trust sets forth the rights, powers and duties of the Trustees. (40a) Part 8.1 sets forth the general powers. (40a) Subsection B grants the Trustees the power to sell real property. Section VIII, Part 8.1, Subsection B provides:

> B. To sell, exchange, assign, transfer, and convey any security, including any securities of any corporate trustee, or property, real or personal, held in the trust estate, at public or private sale, at such time and price and upon such terms and conditions (including credit) as the *Trustee* may determine and to grant options to purchase or acquire any trust estate property. (Emphasis added)
> (40a)

The use of the word "Trustee" in the Trust document refers *collectively* to the Co-Trustees. The use of the singular form of the word in this manner is made clear in Section X, Part 10.6 of the Trust. (50a) Part 10.6 of the Trust is entitled "Definitions", and defines and explains how words or labels are used in the Trust. In determining how the word "Trustee" is used, we first look to Part 10.6, Subpart D:

> **D. Eliminating Distinction Between Genders and Numbers**
>
> As used in this instrument, the masculine, feminine, or neuter gender *and the singular or plural number shall each be allowed to include the others whenever the context so indicates*. (Emphasis added)

Next, "Trustee" is defined in the following Subpart, E:
(51a)

Trustee

> The word "Trustee" as used in this Declaration, except where otherwise specifically provided, shall be construed to apply equally to individual and corporate trustees nominated herein if and so long as such nominated trustee acts in such capacity. *The term "Trustee" as used herein refers to all persons or corporations occupying the position of Trustee, whether one or more persons together with a corporation occupy the position of Trustee at the same time or times, and includes any successor trustee or trustees.* (Emphasis added)
> (51a)

There can be no question that the document's use of the word "Trustee" in the singular form refers to both Co-Trustees. Any other interpretation is simply not reasonable. Despite the unambiguous language, Defendant-Appellant does attempt to argue a different construction. Defendant-Appellant refers this Court to Part 8.3 of the Trust which states:

> Any fiduciary power or discretion vested in the Initial Trustee shall be vested in and exercisable by any successor trustee.

Defendant-Appellant relies on this language to argue that although the Trust Agreement provides for successor co-trustees, the Trust Agreement specifically states that "any" successor trustee can bind the trust and thus does not require that the Trust's activities be conducted jointly by the co-trustees. Through such reasoning, Defendant-Appellant argues any co-trustee could exercise sole authority to bind the Trust. Not only does Defendant-Appellant's argument stretch the outermost limits of credulity, but Defendant-Appellant argues Part 8.3 out of context. Part 8.3, as titled, simply provides that successor trustees have the same power as the initial trustee—not that one of the co-trustees can exercise power without the other. Part 8.3 is titled, "No Limitations on Successor Trustee's Power"(44a), and is a standard, boilerplate clause contained in trust documents. The powers of the initial trustee, Norman John Sinclair, are enumerated in the Trust documents. More often than not, the successor trustee's powers are identical to the initial trustee's powers. In lieu of

reiterating the entire powers of the successor trustees, Part 8.3 provides that the powers of the successor trustee are the same as the initial trustee.

The language of the Trust Agreement is not ambiguous, but the Agreement must be read as a whole. The Defendant-Appellant simply argues the language out of context. Neither the trial court nor the Court of Appeals were misled. The trial court states on Page 9 of its Opinion and Order:

> The court disagrees with the defendant and does not find that Section 8.3 of the Trust gives only one Trustee, when two are acting, the authority to enter into the purchase agreement at issue.
>
> Section 8.3 of the Trust provides:
>
> > Any fiduciary power or discretion vested in the initial trustee shall be vested in and exercisable by any successor trustee.
>
> Although the language in Section 8.3 of the trust contained the word "any", this section of the trust simply states a successor trustee has the same powers as the initial trustee. *Furthermore, there is no other language in the trust granting one trustee the authority to act when there are co-trustees.* (Emphasis added)
> (8a)

The Court of Appeals affirmed the trial court's interpretation of the trust language. As to section 8.3 of the trust, the Court of Appeals notes that this language giving a successor trustee all the rights and powers of the first name trustee mirrors the statutory provision to the same effect. MCL 700.7405. (11a)

1. The expert opinion of Thomas W. Payne, Esq. interpreting the language of the Trust Agreement appointing the co-trustees and interpreting Section 8.3 of the Trust Agreement is proper and is evidence uncontested.

At 94a is the Affidavit of Thomas W. Payne, Esq. This Affidavit was submitted as an exhibit to the Plaintiff-Appellees' Motion for Summary Disposition. Mr. Payne has been retained as an expert to offer his interpretation and opinion as to the language of the Trust and

the subject matter of this action. Mr. Payne has been a practicing attorney in the State of Michigan since February of 1953 and his practice has been confined almost exclusively to estate planning, the handling of estates and trusts, and the taxation of estates and trusts. Mr. Payne's credentials and experience are set forth in his Affidavit. Furthermore, Mr. Payne has served as an expert witness on estate matters in many lawsuits in Wayne, Oakland, Macomb, Livingston and St. Clair counties.

Upon review of the Trust, Mr. Payne states his opinion that, "Norman John Sinclair, made it very clear that he was appointing his two daughters, Norma Jean Castle and Barbara Sue Traxler, as co-trustees. . . and that unless there was clear and compelling evidence that one of the daughters was unable or had, in writing, stated her unwillingness to act as a co-trustee, . . . that both co-trustees must act in unison to bind the trust." In his attached Affidavit, specifically paragraph 10(b), (c), (d)(1) and (d)(2), Mr. Payne sets forth his reasoning and the specific provisions of the Trust which he relies upon in basing his opinion. (96a)

The evidence and the law overwhelmingly support the Plaintiffs' position that both Norma Jean Castle and Barbara Sue Traxler were Successor Co-Trustees and both had to act if there was to be a valid agreement for the sale of the Trust property. Despite this evidence that Successor Co-Trustee, Barbara Sue Traxler, did not have sole authority to bind the Trust, Defendant attempts to argue that Section 8.3 of the Trust negates all the language in the Trust documents, including the language appointing the Successor Co-Trustees and the language of the Certificate of Trust Existence and Authority, as well as the applicable law. The Defendant simply argues this section out of context. *As titled*, Section 8.3 is simply the mechanism that provides that the Successor Trustees (whether there is one, two or however many and in

whatever manner appointed in the Trust documents) have the same authority as the initial Trustee (in our case, the Plaintiffs' father, Norman John Sinclair).

An expert's opinion on the customary use of the standard boilerplate language contained in Section 8.3 in trust documents is unequivocally admissible to assist the trier of fact. MRE 702. When the contractual language is clear, its construction is a question of law for the court to decide. Dillon v DeNooyer Chevrolet Geo, 217 Mich App 163 (1996); G&A, Inc v Nahra, 204 Mich App 329 (1994). The Plaintiffs concede that an expert's opinion would be inadmissible where it goes so far as to interpret a question of law. People v Drossart, 99 Mich App 66; 297 NW2d 863 (1980). However, an expert may testify to facts relevant to applicable legal principles. Drossart at 77. The fact that the expert's opinion embraces an ultimate issue to be decided by the trier of fact is not objectionable. MRE 704.

In our case, the Plaintiffs submit as evidence the expert opinion of estate and probate attorney Thomas W. Payne, as set forth in his Affidavit attached as Exhibit H to the Plaintiffs' Brief in Support of their Motion for Summary Disposition. (94a) There can be no question that Mr. Payne would be qualified as an expert in his field based upon his experience as set forth in Paragraphs 1 through 8 of his Affidavit. Specifically at issue is Mr. Payne's statement on Page 3 of his Affidavit, Paragraph 10(d)(1), regarding Section 8.3 of the Trust document. As set forth in his Affidavit, Mr. Payne's expert testimony is as follows:

> d. That Section 8.3 appearing on Page 27 of the Trust document does not negate the general rule of law that both Co-Trustees must act in union to bind the Trust for the following reasons:
>
> (1) Section 8.3 is a boilerplate type of clause which eliminates the necessity of repeating all of the Trustee's powers granted to the initial Trustee by merely stating that whatever powers the initial Trustee was given any successor Trustee will have.
> (96a)

This testimony, which assists in understanding the Trust document, does not invade the province of the court, but is simply and clearly admissible expert testimony regarding custom or usage. The language in a contract, when the parties disagree as to its significance, may be reduced to lawful certainty by judicial effort or by the testimony of men familiar with the trade. Stark v Kent Products, Inc., 62 Mich App 546, 548; 233 NW2d 643 (1975); Aetna Casualty & Surety Co v Dow Chemical Co, 28 FSupp2d 440 (1998) (even though interpretation of ambiguous insurance policy is question of law under Michigan law, expert testimony is admissible as evidence of custom and usage); Whittaker Corp v Michigan Mutual Liability Co, 58 Mich App 34, 37; 227 NW2d 1 (1975) (courts may resort to industry knowledge to construe ambiguous technical terms in a contract. Such terms are to be interpreted as they are usually understood by persons in the profession or business to which they relate); Rood v General Dynamics Corp, 444 Mich 107, 118 n 17 (1993) (just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including . . . usage of trade) Expert Thomas W. Payne's opinion regarding the use of Section 8.3 of the Trust document as a boilerplate clause in the custom and manner of preparing trusts is therefore admissible as expert opinion on custom or usage. Accordingly, the Court of Appeals Opinion should be affirmed since its decision is in accord with the accepted custom and usage of trusts.

RELIEF

For the reasons stated in their Brief on Appeal, Plaintiffs-Appellees respectfully ask this Court to affirm the March 2, 2004, Court of Appeals Opinion and Decision affirming the

June 13, 2002, Opinion and Order of the Oakland County Circuit Court granting the Plaintiffs-Appellees' Motion for Summary Disposition declaring the purchase agreement null and void and denying the Appellant-Defendant's Motion for Summary Deposition for Specific Performance.

Respectfully submitted,

RAY M. TOMA, P.C.

By_____

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